MOTION FILED
SEP 07 2001

No. 01-46

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,

Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR UNITED STATES MARITIME ALLIANCE LIMITED AND CARRIERS CONTAINER COUNCIL, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

C. PETER LAMBOS*
DONATO CARUSO
LAMBOS & JUNGE
29 Broadway - 9th Floor
New York, New York 10006
(212) 943-2470

Attorneys for Amici Curiae United States Maritime Alliance Limited and Carriers Container Council, Inc.

* *Counsel of Record*

169148

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

14 pp

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Introduction

In 1994, Respondent South Carolina State Ports Authority ("SCSPA") petitioned the Federal Maritime Commission ("FMC"), the petitioner herein, for approval of certain amendments SCSPA proposed to include in its FMC-filed terminal tariff, which prescribes the terms and conditions SCSPA imposes on customers and contractors utilizing its marine terminal facilities in the Port of Charleston. *See Petition of South Carolina State Ports Auth. For Declaratory Order*, Docket No. 94-24, Final Decision (FMC Aug. 12, 1997), *available at http://www.fmc.gov/dockets/94-24.ord.* SCSPA's proposed tariff amendments included guidelines for the licensing by SCSPA of stevedores and marine terminal operators allowed to use SCSPA's facilities and for reserving to SCSPA itself certain terminal functions at the facility, thus denying competitors access to its publicly-owned facilities to perform these functions. Carriers Container Council, Inc., ("CCC"), which now seeks leave to file the attached *amici curiae* brief, was permitted by the FMC to intervene in opposition to SCSPA's tariff amendments to protect CCC's carrier-members' right to use the services of stevedores and marine terminal operators of their own choosing. CCC also protested the tariff amendment requiring applicants for stevedore licenses to promote commerce through Charleston because it would unjustly discriminate against multi-port stevedores in violation of federal shipping law.

Just last year CCC and United States Maritime Alliance Limited ("USMX"), the two movants for permission to file the attached brief as *amici curiae*, contemplated the filing of a complaint with the FMC against SCSPA for imposing restrictions at its facility that prohibited CCC's and USMX's carrier-members from utilizing a gate at SCSPA's Charleston

terminal that was operated by a marine terminal company that competed with SCSPA. SCSPA staffs its gate with state employees; the competing terminal operator uses longshore workers represented by the International Longshoremen's Association, AFL-CIO ("ILA"). SCSPA's restriction prevented CCC's and USMX's carrier-members from complying with the obligation in their collective bargaining agreement with the ILA that requires them to use longshore workers represented by the ILA.

USMX and CCC hereby move, pursuant to SUP. CT. R. 37.2(b), for leave to file the attached brief *amici curiae* to join petitioner in seeking this Court's review of a decision that threatens to deprive USMX and CCC of avenues of relief they have resorted to in the past to vindicate their members' federal shipping law rights against state port authorities. Petitioner Federal Maritime Commission has consented to the filing of this *amici curiae* brief. Its written consent has been lodged with the Clerk of the Court. Respondent SCSPA has refused to consent.

Movants: Their Identities, Purposes, and Functions

USMX and CCC are non-profit membership associations which are the principal management, multiemployer collective bargaining representatives for employers of longshore workers on the Atlantic and Gulf Coasts of the United States. USMX is an association of ocean carriers, port associations, marine terminal operators, and stevedoring companies. USMX's members handle virtually all of the general cargo shipped through United States ports on the East and Gulf Coasts. CCC is an association of the major United States and foreign ocean carriers serving United States ports in connection with the transportation of goods by sea in international trade and commerce. CCC's 25 carrier-members during the past calendar year transported to and from United States Atlantic and Gulf ports more than 50 million tons of containerized cargo in the foreign trades of the Untied States. This cargo volume amounts to approximately three-fourths of all containerized cargo loaded and unloaded at United States Atlantic and Gulf ports.

The principal mission of USMX and CCC is to represent their members in collective bargaining with the ILA — the labor organization that represents dockworkers employed on the Atlantic and Gulf Coasts. USMX is the lead negotiator in Master Contract negotiations with the ILA covering ports from Maine to Texas; CCC is primarily responsible for Master Contract administration. This Master Contract establishes the terms and conditions of employment for tens of thousands of American longshore workers on the Nation's Eastern and Southern shores.

USMX and CCC also represent their members' interests in regulatory matters that affect their business and labor practices. The carrier members of these associations are the customers of Respondent SCSPA and other state port authorities operating marine terminals in United States ports. The stevedoring- and marine-terminal-members of USMX are the competitors and contractors of these state authorities. In the past, federal shipping law has provided CCC, USMX, and their members with the means to challenge actions taken by these state port authorities that interfered with the commercial interests of the members of CCC and USMX or impeded the administration of their collective bargaining agreements with the ILA. *See supra* pp. 1-2.

Movants' Interest In This Case

The extension by the court of appeals in this case of the doctrine of state sovereign immunity to proceedings before federal administrative agencies is a crucial issue of constitutional law that affects the interests of CCC, USMX, and their members. If the decision of the court of appeals in this case is allowed to stand, the members of USMX, CCC, and other bargaining and trade associations in the maritime industry will be deprived of

the rights provided by Congress to obtain recourse for shipping law violations committed by state commercial instrumentalities operating marine terminals that are essential for the conduct of the members' transportation businesses. These shipping law violations may not only affect the members' commercial interests but also may have a significant impact upon their collective bargaining interests. Indeed, over the years the FMC has decided shipping law cases that have had a direct and immediate impact on collective bargaining in the maritime and longshore industries. *See, e.g., Volkswagenwerk AG v. FMC*, 390 U.S. 261 (1968); *New York Shipping Ass'n v. FMC*, 854 F.2d 1338 (D.C. Cir. 1988), *cert. denied*, 488 US. 1041 (1989); *Boston Shipping Ass'n v. FMC*, 706 F.2d 1231 (1st Cir. 1983).

USMX's and CCC's brief *amici curiae* will present the views of customers, competitors, and contractors of state-operated marine terminals and provide the perspective of private enterprise in a case that centers upon an intergovernmental controversy. Because of the singular importance of the constitutional issue presented, the vital and compelling interests of CCC, USMX, and their members in the resolution of that issue, and the particular perspective they provide, CCC and USMX request leave to file the attached brief as *amici curiae* in this case.

Respectfully submitted,

C. PETER LAMBOS*
DONATO CARUSO
LAMBOS & JUNGE
29 Broadway - 9th Floor
New York, New York 10006
(212) 943-2470

Attorneys for Amici Curiae United States Maritime Alliance Limited and Carriers Container Council, Inc.

* *Counsel of Record*

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Introduction	1
Interest of the *Amici Curiae*	2
Summary of Argument	3
Argument	4
Review On Writ Of Certiorari Is Warranted Because This Case Involves A Novel Constitutional Question Of National Importance That Has A Direct And Substantial Impact On The Federal Regulatory Regime	4
A. Constitutional Question Of First Impression	5
B. Nationwide Effect Of Decision Below Upon Federal Regulatory System	6
C. Decision Below Contravenes The Constitutional Plan	10
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

United States Constitution:

art. I, § 8, cl. 3 11

art. I, § 8, cl. 10 11

art. I, § 9, cl. 5 11

art. I, § 9, cl. 6 11

art. I, § 10, cl. 2 11-12

art. I, § 10, cl. 3 11-12

U.S. CONST. amend. XI 4n, 5

Cases:

Alden v Maine, 527 U.S. 706 (1999) 5, 10

Bethlehem Steel Corp. v. Indiana Port Comm'n, 21 F.M.C. 629 (1979) 7n

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 12

California v. United States, 320 U.S. 577 (1944) 7

Ceres Marine Terminal, Inc. v. Maryland Port Admin., 27 Shipping Reg. Rep. (P&F) 1251 (FMC 1997), *remanded*, 1998 U.S. App. LEXIS 25733 (4th Cir. 1998) 7n

Cited Authorities

Page

Clark v. Barnard, 108 U.S. 436 (1883) 5

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 5, 11

Connecticut Dep't of Environmental Protection v. OSHA, 138 F. Supp. 2d 285 (D. Conn. 2001) ... 9n

Elhaj-Chehade v. University of Texas, 1999 OCAHO LEXIS 3 (Jan. 28, 1999) 9n

Florida v. United States, 133 F. Supp. 2d 1280 (N.D. Fla. 2001) 9n

Hans v. Louisiana, 134 U.S. 1 (1890) 5

Harrington & Co. v. Georgia Ports Auth., 23 Shipping Reg. Rep. (P&F) 753 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 1276 (FMC 1986) 7n

Hensel v. Office of Chief Administrative Hearing Officer, 38 F.3d 505 (10th Cir. 1994) 9

James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist., 27 Shipping Reg. Rep. (P&F) 1123 (FMC 1997) 7n

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 5

Page

Kupferberg v. University of Oklahoma Health Sciences Center, 1994 OCAHO LEXIS 99 (Nov. 21, 1994) 9n

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 10

Ohio Environmental Protection Agency v. United States Dept. of Labor, 121 F. Supp. 2d 1155 (S.D. Ohio 2000) 9n

Palmetto Shipping & Stevedoring Co. v. Georgia Ports Auth., 24 Shipping Reg. Rep. (P&F) 50 (I.D.), *adopted*, 24 Shipping Reg. Rep. (P&F) 761 (FMC 1988) 7n

Pate Stevedore Co. of Mobile v. Alabama State Docks Dep't, 24 Shipping Reg. Rep. (P&F) 657 (I.D.), *adopted*, 24 Shipping Reg. Rep. (P&F) 1221 (FMC 1989) 7n

Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) 10n

Rhode Island v. United States, 115 F. Supp. 2d 269 (D. R.I. 2000) 9n

Ryan Walsh, Inc. v. Port of Houston Auth., No. 97-16, Approval of Settlement (FMC ALJ Apr. 30, 1998), *available at http://www.fmc.gov/dockets/97-16ABC.htm* 7n

Page

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 4, 5

South Carolina State Ports Auth. v. Georgia Ports Auth., 22 Shipping Reg. Rep. (P&F) 1111 (FMC 1984) 7n

Southeastern Mar. Co. v. Georgia Ports Auth., 23 Shipping Reg. Rep. (P&F) 530 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 941 (FMC 1986) 7n

Stevens Shipping & Terminal Co. v. South Carolina State Ports Auth., 23 Shipping Reg. Rep. (P&F) 267 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 684 (FMC 1985) 7n

United States Lines v. Maryland Port Admin., 23 F.M.C. 441 (1980) 7n

United States v. Locke, 529 U.S. 89 (2000) 12

United States v. Texas, 143 U.S. 621 (1892) 10n

Wong-Opasi v. Tennessee, 2000 OCAHO LEXIS 2 (Jan. 11, 2000) 9n

Cited Authorities

	Page
Statutes:	
8 U.S.C.A. § 1324a (West 1999 & Supp 2001) ...	9
15 U.S.C.A. § 2622 (West 1998)	9n
33 U.S.C.A. § 1367 (West 1986)	9n
42 U.S.C.A. § 300j - 9(i) (West Supp. 2000)	9n
42 U.S.C.A. § 5851 (West 1995)	9n
42 U.S.C.A. § 6971 (West 1995)	9n
42 U.S.C.A. § 7622 (West 1995)	9n
42 U.S.C.A. § 9610 (West 1995)	9n
Rules:	
SUP. CT. R. 37.6	1n

BRIEF FOR UNITED STATES MARITIME ALLIANCE LIMITED AND CARRIERS CONTAINER COUNCIL, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTION[1]

The United States Court of Appeals for the Fourth Circuit has ruled that State sovereign immunity trumps Congress's power to authorize private litigants to obtain redress against State commercial instrumentalities before federal administrative agencies for the instrumentalities' violation of federal law. This decision involves a novel question of constitutional law never before addressed by this Court. The Fourth Circuit's resolution of this issue, if left undisturbed, will upset longstanding congressional regimes not only in the maritime industry but also in other sectors of the national economy that have historically subjected state commercial activities to the same federal regulation applicable to private enterprises.

The court of appeals in this case has unleashed the doctrine of State sovereign immunity from its Article III moorings and allowed it to wander into Article I waters, where it threatens to deprive private enterprises of recourse before federal administrative agencies to remedy violations of federal law committed by state commercial instrumentalities. Review of this case will enable the Court to cabin the scope of State sovereign immunity to promote a federalism that binds the States to the supremacy of federal regulation of objects committed by the Constitution to exclusive federal sovereignty.

---

1. In accordance with SUP. CT. R. 37.6, this is to confirm that no part of this brief was authored by counsel for any party and that only the *amici curiae* contributed monetarily to the preparation and submission of this brief.

INTEREST OF THE *AMICI CURIAE*

United States Maritime Alliance Limited ("USMX") and Carriers Container Council, Inc. ("CCC") are non-profit membership associations which are the principal management, multiemployer collective bargaining representatives for employers of longshore workers on the Atlantic and Gulf Coasts of the United States.

USMX is an association of ocean carriers, port associations, marine terminal operators, and stevedoring companies. USMX's members handle virtually all of the general cargo shipped through United States ports on the East and Gulf Coasts. CCC is an association of the major United States and foreign ocean carriers serving United States ports in connection with the transportation of goods by sea in international trade and commerce. CCC's 25 members during the past calendar year transported to and from United States Atlantic and Gulf ports more than 50 million tons of containerized cargo in the foreign trades of the Untied States. This cargo volume amounts to approximately three-fourths of all containerized cargo loaded and unloaded at United States Atlantic and Gulf ports.

The principal mission of USMX and CCC is to represent their members in collective bargaining with the International Longshoremen's Association, AFL-CIO ("ILA") — the labor organization that represents dockworkers employed on the Atlantic and Gulf Coasts. USMX is the lead negotiator in Master Contract negotiations with the ILA covering ports from Maine to Texas; CCC is primarily responsible for Master Contract administration. This Master Contract establishes the terms and conditions of employment for tens of thousands of American longshore workers on the Nation's Eastern and Southern shores.

USMX and CCC also represent their members' interests in regulatory matters. The carrier members of these associations are the customers of Respondent South Carolina State Ports Authority ("SCSPA") and other state port authorities operating marine terminals in United States ports. The stevedoring- and marine-terminal-members of USMX are the competitors and contractors of these state authorities. In the past, federal shipping law has provided CCC, USMX, and their members with the means to challenge actions taken by these state port authorities that interfered with the commercial interests of the members of CCC and USMX or impeded the administration of their collective bargaining agreements with the ILA. Should the decision of the court of appeals in this case be permitted to stand, the members of USMX and CCC would be deprived of these remedies that Congress has provided. The *amici* joining in this brief, therefore, have a vital and compelling interest in convincing this Court to entertain review of this case to define the appropriate parameters of State sovereign immunity.

SUMMARY OF ARGUMENT

Review by writ of certiorari is warranted because the rule of decision of the court of appeals involves a question of constitutional law never before addressed by this Court. The decision of the court of appeals, if left undisturbed, places in jeopardy the continuing vitality of private complaint proceedings before administrative agencies to redress violations of federal law by state commercial instrumentalities. The principal of constitutional law adopted by the court of appeals is already hindering the enforcement not only of federal shipping laws but also of the whistleblower provisions of federal environmental statutes and the employment discrimination prohibitions of federal immigration statutes.

Issuance of a writ of certiorari will enable this Court to limit the reach of the doctrine of State sovereign immunity by holding that state instrumentalities engaged in commercial activities, like maritime commerce, that fall within the objects committed by the plan of the Constitution to the exclusive sovereignty of the Federal Government are subject to regulation under applicable federal law by duly constituted federal regulatory agencies which may require those state commercial entities to defend complaints filed by private persons in administrative proceedings before the agencies. This refinement of the doctrine of State sovereign immunity will promote a federalism that binds the States to the sovereignty they granted to the Federal Government when they ratified the Constitution.

ARGUMENT

Review On Writ Of Certiorari Is Warranted Because This Case Involves A Novel Constitutional Question Of National Importance That Has A Direct And Substantial Impact On The Federal Regulatory Regime

At the close of the Twentieth Century this Court issued a series of decisions that fortified the protections afforded to the States by the Eleventh Amendment and the doctrine of sovereign immunity.[2] In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996), the Court ruled that the principle of state sovereign immunity embodied in the

2. The Eleventh Amendment provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

Eleventh Amendment prevents congressional authorization in federal enactments of suits by private parties in the federal courts against unconsenting States. *Seminole Tribe* awakened the echoes of *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), which had observed that each State is a sovereign in the federal system and that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States."

In *Alden v Maine*, 527 U.S. 706 (1999), this Court held that the sovereign immunity of the States extends to private suits to enforce federal statutory rights in state courts. In the view of the *Alden* Court, the sovereign immunity of the States derives not from the literal language of the Eleventh Amendment, which "confirmed rather than established sovereign immunity as a constitutional principle," but from the structure of the original Constitution itself. 527 U.S. at 728-29.

While a State may waive its sovereign immunity by consenting to suit, *see Clark v. Barnard*, 108 U.S. 436, 447-48 (1883), this Court in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 679-87 (1999), held that a State's proprietary activities in a traditionally for-profit enterprise does not constitute a constructive waiver of its sovereign immunity from an Article III lawsuit.

A. Constitutional Question Of First Impression

The decisions of this Court have confined the doctrine of sovereign immunity to assertions of judicial power against the States. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 98 (2000) (Stevens, J. dissenting) ("*Seminole Tribe* . . . leaves open a State's liability upon enforcement of federal law by federal agencies."). The court of appeals in this case went

where this Court had never gone before. The court below ruled that States were immune from the exercise of federal Executive Power by an administrative agency established by Congress through the exercise of its Article I powers. It held that a State's sovereign immunity protects it from being brought before a federal administrative agency by a private party (Pet. App. 2a).[3] In the view of the court of appeals, the doctrine of sovereign immunity deprives Congress of the authority to permit private parties to hale unconsenting States into any adversarial proceeding, including those within the adjudicative apparatus of federal agencies and commissions (Pet. App. 12a, 25a).

B. Nationwide Effect Of Decision Below Upon Federal Regulatory System

The importance of the constitutional question presented in this case is self-evident. Apart from the fact that the issue is one of first impression never before addressed by the Supreme Court, its resolution by the court of appeals places in jeopardy the continued vitality of enforcement mechanisms that form the backbone of the federal regulatory system. Many federal enactments contain administrative procedures that enable private litigants to commence complaint proceedings before federal agencies to obtain redress for violations of the substantive provisions of these federal statutes. Private litigants are the agencies' eyes and ears. These private parties bring to the agencies' attention possible infringements of federal law that would otherwise go undetected if enforcement were to depend solely upon the limited resources of the agencies themselves. Indeed, in its decision in this case, Petitioner Federal Maritime Commission ("FMC") explained that its "jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports." (Pet. App. 33a).

3. The abbreviation "Pet. App." refers to the separately bound appendix that accompanied the petition for certiorari filed in this case.

Private complaint proceedings against States involved in activities subject to federal regulation have been a staple of administrative law. This is particularly true before Petitioner FMC. Almost a half century ago this Court held that state instrumentalities by virtue of their operation of marine terminal facilities are "persons" subject to regulation under federal shipping statutes. *See California v. United States*, 320 U.S. 577, 585-86 (1944). Indeed, over the years Respondent SCSPA and its counterparts in other ports have been brought before the FMC in complaint proceedings commenced by private parties to redress alleged shipping law violations by these state instrumentalities.[4] At no time prior to this case was there ever any question raised that this type of administrative proceeding was an impermissible infringement of the instrumentalities' sovereign immunity.

4. *See Ryan Walsh, Inc. v. Port of Houston Auth.*, No. 97-16, Approval of Settlement (FMC ALJ Apr. 30, 1998), *available at http://www.fmc.gov/dockets/97-16ABC.htm*; *Ceres Marine Terminal, Inc. v. Maryland Port Admin.*, 27 Shipping Reg. Rep. (P&F) 1251 (FMC 1997), *remanded*, 1998 U.S. App. LEXIS 25733 (4th Cir. 1998); *James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, 27 Shipping Reg. Rep. (P&F) 1123 (FMC 1997); *Pate Stevedore Co. of Mobile v. Alabama State Docks Dep't*, 24 Shipping Reg. Rep. (P&F) 657 (I.D.), *adopted*, 24 Shipping Reg. Rep. (P&F) 1221 (FMC 1989); *Palmetto Shipping & Stevedoring Co. v. Georgia Ports Auth.*, 24 Shipping Reg. Rep. (P&F) 50 (I.D.), *adopted*, 24 Shipping Reg. Rep. (P&F) 761 (FMC 1988); *Harrington & Co. v. Georgia Ports Auth.*, 23 Shipping Reg. Rep. (P&F) 753 (I.D.), *adopted* , 23 Shipping Reg. Rep. (P&F) 1276 (FMC 1986); *Southeastern Mar. Co. v. Georgia Ports Auth.*, 23 Shipping Reg. Rep. (P&F) 530 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 941 (FMC 1986); *Stevens Shipping & Terminal Co. v. South Carolina State Ports Auth.*, 23 Shipping Reg. Rep. (P&F) 267 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 684 (FMC 1985); *South Carolina State Ports Auth. v. Georgia Ports Auth.*, 22 Shipping Reg. Rep. (P&F) 1111 (FMC 1984); *United States Lines v. Maryland Port Admin.*, 23 F.M.C. 441 (1980); *Bethlehem Steel Corp. v. Indiana Port Comm'n*, 21 F.M.C. 629 (1979).

It has always been a fact of life in the shipping industry that state port authorities engaged in the business of marine terminal operations subject to the shipping laws of the United States must defend complaint proceedings brought against them before the FMC. Indeed, for the first 37 years of SCSPA's existence, from its formation in 1962 until 1999, there was never any doubt voiced by SCSPA as to this regulatory obligation. In 1999, however, the SCSPA amended the terminal tariff it files with the FMC governing the terms and conditions SCSPA sets for use of the marine terminals it operates in South Carolina to include an express choice of forum clause. The amendment provides that every person utilizing SCSPA's marine terminals consents to the jurisdiction of the South Carolina state courts in any actions against the SCSPA arising from the terminal services the Authority furnishes except for "actions brought pursuant to Acts of the Congress of the United States that expressly designate the jurisdiction in which such actions should be brought and from which the Authority would not have sovereign or eleventh amendment immunity." SCSPA's Terminal Tariff No. FMC-T No. 8, Rule 34-021 (effective Jan. 6, 1999), *available at http://www.port-of-charleston.com*. While the tariff amendment contains an implicit recognition that SCSPA is answerable in those tribunals designated by Congress, which in the case of state-operated marine terminals, like SCSPA, undoubtedly means the Federal Maritime Commission, the amendment for the first time in SCSPA's history invokes the concept of sovereign or eleventh amendment immunity as a possible impediment to the exercise of jurisdiction by that congressionally designated tribunal.

The intrusion of the doctrine of sovereign immunity into the federal regulatory regime is hindering the enforcement of other federal statutes besides the shipping acts. The enforcement of "whistleblower" provisions enacted by

Congress in federal environmental statutes has been affected.[5] Within the last year and a half, four federal district courts, including one that relied heavily on the decision of the court of appeals in this case, invoked the sovereign immunity doctrine to bar federal administrative proceedings commenced by whistleblowers seeking recourse for retaliatory or discriminatory actions taken against them by their state employers.[6] Administrative proceedings before the Executive Office For Immigration Review by employees seeking recourse under the Immigration Reform and Control Act, 8 U.S.C.A. § 1324a (West 1999 & Supp 2001), for citizenship-based employment discrimination by State instrumentalities have been outlawed by the United States Court of Appeals for the Tenth Circuit in a decision in which the court of appeals simply assumed without discussion that the administrative proceeding qualified as a lawsuit for sovereign immunity purposes. *See Hensel v. Office of Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994). The Tenth Circuit's ruling has shut the door of the Executive Office For Immigration Review to victims of citizenship-based employment discrimination by state employers.[7]

---

5. 15 U.S.C.A. § 2622 (West 1998) (Toxic Substance Control Act); 33 U.S.C.A. § 1367 (West 1986) (Water Pollution Prevention & Control Act); 42 U.S.C.A. § 300j - 9(i) (West Supp. 2000) (Safe Drinking Water Act); 42 U.S.C.A. § 5851 (West 1995) (Energy Reorganization Act); 42 U.S.C.A. § 6971 (West 1995) (Solid Waste Disposal Act); 42 U.S.C.A. § 7622 (West 1995) (Clean Air Act); 42 U.S.C.A. § 9610 (West 1995) (Comprehensive Environmental Response Compensation & Liability Act).

6. *Connecticut Dep't of Environmental Protection v. OSHA*, 138 F. Supp. 2d 285 (D. Conn. 2001); *Florida v. United States*, 133 F. Supp. 2d 1280 (N.D. Fla. 2001); *Ohio Environmental Protection Agency v. United States Dept. of Labor*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000); *Rhode Island v. United States*, 115 F. Supp. 2d 269 (D. R.I. 2000).

7. *See Wong-Opasi v. Tennessee*, 2000 OCAHO LEXIS 2 (Jan. 11, 2000); *Elhaj-Chehade v. University of Texas*, 1999 OCAHO LEXIS 3 (Jan. 28, 1999); *Kupferberg v. University of Oklahoma Health Sciences Center*, 1994 OCAHO LEXIS 99 (Nov. 21, 1994).

The decision of the court of appeals in this case has nationwide ramifications that threaten the traditional enforcement mechanisms of federal regulation. Extending the reach of State sovereign immunity to administrative proceedings permits state entities to violate federal law with impunity. Whistleblowers and other employees will be vulnerable to discharge and employment discrimination for which they have no relief. This lack of personal recourse hardly encourages the reporting by state employees of violations of federal environmental law. By the same token the members of the *amici curiae* submitting this brief will be virtually powerless to vindicate their shipping law rights against state port authorities, which act not as governmental regulators but as private entrepreneurs. The suggestion that the federal agencies themselves can effectively compel States' compliance with federal law[8] suffers from a naively optimistic appraisal of the capabilities and resources of federal regulatory bodies. *See Alden v. Maine*, 527 U.S. 706, 810 (1999) (Souter, J., dissenting).

C. Decision Below Contravenes The Constitutional Plan

What is needed is this Court's refinement of the doctrine of State sovereign immunity to assure a faithful adherence to the constitutional plan as it has been understood over the past century in the establishment and development of the regime of federal regulation. "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819).

8. The doctrine of state sovereign immunity does not shield the States from suits brought by the Federal Government. *Alden v. Maine*, 527 U.S. 706, 755-56 (1994); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934); *United States v. Texas*, 143 U.S. 621, 644-45 (1892).

To subject state instrumentalities engaged in commercial activities that fall within the objects committed by the Constitution to the Federal Government to regulation under applicable federal law by duly constituted federal regulatory agencies does no violence to the inherent nature of state sovereignty. What it does do is confirm and give effect to the longstanding understanding of all those private and governmental commercial enterprises operating within the realm of federal regulation that State sovereign immunity has never sanctioned special treatment for state commercial instrumentalities. The mark of effective regulation is evenhandedness. State commercial entities and private market participants expect a level playing field where they are subjected to the same regulatory obligations, including the need to respond to complaints before federal regulators for alleged violations of federal law.

> When a State engages in ordinary commercial ventures, it acts like a private person, outside the area of its "core" responsibilities, and in a way unlikely to prove essential to the fulfillment of a basic governmental obligation. A Congress that decides to regulate those state commercial activities rather than to exempt the State likely believes that an exemption, by treating the State differently from identically situated private persons, would threaten the objectives of a federal regulatory program aimed primarily at private conduct.

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 694-95 (1999) (Breyer, J. dissenting) (citations omitted).

Regulation of maritime commerce was one of the objects committed exclusively to the Federal Government. *See* U.S. CONST. art. I, § 8, cl. 3, 10; art. I, § 9, cl. 5, 6; art. I,

§ 10, cl. 2, 3. The need to repose regulatory power over maritime commerce exclusively in the Federal Government to thwart the Balkanizing effects of the States' parochial intervention was one of the reasons for the adoption of the Constitution. *See United States v. Locke*, 529 U.S. 89, 99 (2000). The plan of the convention, therefore, called for the States to surrender to the Federal Government sovereignty over the regulation of maritime commerce.

The constitutional grant of sovereignty to the Federal Government over maritime commerce was not conditional. The power to regulate includes the adoption of not only substantive law but also appropriate remedies and procedures essential to the fulfillment of the regulatory objectives embodied in the substantive provisions. By engaging in the profit-making operation of marine terminals in their ports, the States implicitly surrender their sovereignty and submit to the regulatory sovereignty over maritime commerce they granted exclusively to the Federal Government in the constitutional compact. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991).

Inherent in this submission to the sovereignty of the Federal Government is the acceptance of the regulatory rules both substantive and procedural enacted by the Federal Sovereign. That the regulatory regime includes having to defend complaint proceedings brought by private persons does not constitute coercive and disrespectful overriding of the sovereign immunity of the States. The state commercial instrumentality in this case voluntarily chose to engage in an enterprise which it well knew fell within the regulatory sovereignty of the Federal Government. To submit to the regulatory jurisdiction of the Federal Maritime Commission, the agency entrusted by Congress with the enforcement of federal shipping laws, is perfectly consistent with the constitutional plan, which South Carolina and all the other States have ratified.

CONCLUSION

The novel extension by the court of appeals in this case of the State sovereign immunity doctrine to administrative proceedings before federal agencies imposes a constitutionally unwarranted burden upon the federal regulatory system. The ramifications nationwide on the enforcement of federal shipping laws and other regulatory statutes support the need for review by this Court. A writ of certiorari will enable the Court to review a substantial constitutional question that it has not yet addressed and establish an appropriate definition of State sovereign immunity that will promote a federalism that binds the States to the sovereignty they granted to the Federal Government to regulate maritime commerce. The petition of the Federal Maritime Commission should be granted, and a writ of certiorari issued to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

C. PETER LAMBOS*
DONATO CARUSO
LAMBOS & JUNGE
29 Broadway - 9th Floor
New York, New York 10006
(212) 943-2470

Attorneys for Amici Curiae United States Maritime Alliance Limited and Carriers Container Council, Inc.

* *Counsel of Record*